

(REDACTED VERSION)

BEFORE THE
DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

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1. *Journal of the American Medical Association*, 1997; 277: 1039-1043.

In the Matter of :
 :
DISCOVERY AIRWAYS, INC. and : Docket 46760
MR. PHILIP Y. HO :
 :

JOINT MOTION OF
DISCOVERY AIRWAYS, INC.
AND MR. PHILIP Y. HO
TO THE ADMINISTRATIVE LAW JUDGE

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June 20, 1990

B/448NPBL039.90

NOTICE: THIS DOCUMENT IS BEING SUBMITTED ON A CONFIDENTIAL BASIS
PURSUANT TO RULE 39 OF THE DOT'S RULES OF PRACTICE.

In view of the urgency of the matters at issue in this Motion, and the imminence of the currently-established hearing date in this proceeding, Discovery and Mr. Ho urge that the deadline for Answers to this Motion be shortened to noon on Thursday, June 21, 1990.

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JOINT MOTION OF
DISCOVERY AIRWAYS, INC.
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TO THE ADMINISTRATIVE LAW JUDGE

Pursuant to Rule 18 of the Rules of Practice of the Department of Transportation (DOT), Discovery Airways, Inc. (Discovery) and Mr. Philip Y. Ho (Mr. Ho) (collectively, Movants) hereby jointly move the Administrative Law Judge: (1) to postpone the hearing in this proceeding for an indefinite period, and (2) to issue an order referring the attached proposed compromise settlement of the issues in this proceeding to the DOT Decisionmaker for determination.

In support whereof, Movants state as follows:

1. Discovery, Mr. Ho, and certain other named corporations and individuals have reached an agreement with the DOT's Public Counsel proposing to settle all contested issues in this proceeding on the basis of a Consent Order and Stipulation of

Facts, as set forth in certain attachments to the Joint Petition of Discovery and Mr. Ho to the DOT Decisionmaker, which is being filed concurrently with this Joint Motion. A copy of the proposed Consent Order is contained in Attachment A to this Motion.

2. For the reasons stated in the concurrent Joint Petition, only a very brief amount of time is available for final resolution of the issues raised by the proposed compromise settlement. Due to circumstances beyond the control of Discovery and Mr. Ho, any delay in final action on the Joint Petition will result in events which will render moot the relief requested in the Joint Petition. For that reason, Discovery and Mr. Ho submit that the immediate referral of the questions presented to the DOT Decisionmaker for final determination, without an intermediate Initial Decision by the Administrative Law Judge, is necessary and appropriate, and is consistent with Rules 18(e), 22(d) and 29(b) of the DOT's Rules of Practice. In the interest of achieving the most expeditious possible consideration of the issues raised by the Joint Petition, and in view of the fact that certain elements of the relief requested can only be granted by the DOT Decisionmaker, the Joint Petition is being submitted concurrently to the DOT Decisionmaker pursuant to Rule 22(d) of the Rules of Practice.

3. In their Joint Petition, Discovery and Mr. Ho request the DOT Decisionmaker to determine whether the public

interest requires approval of the proposed settlement of all issues in this case on the basis of the Consent Order and Stipulation of Facts, entered into between Discovery, Mr. Ho, various other persons affiliated with Discovery and/or Mr. Ho, and Public Counsel, and to grant certain other relief in connection with that determination.

4. In light of the matters at issue in the Joint Petition, Discovery and Mr. Ho also move the Administrative Law Judge to order an indefinite postponement of the hearing in this proceeding, now scheduled to begin on Tuesday, June 26th. If the Joint Petition is granted, and the proposed settlement is accepted, the issues in this case will become moot, and the proceeding will be terminated. Pending action by the DOT Decisionmaker on that Petition, proceeding to the hearing stage in this case would be a waste of time, money and effort by all concerned.

5. Even if the Petition is not granted within the specified time available, there have been recent substantial developments affecting the matters at issue in this proceeding which warrant both a postponement of the hearing date and a reexamination of the matters at issue in this case. Specifically, the largest voting shareholder of Discovery, Mr. Ho, has announced his intention to dispose of the majority of his investment in Discovery, and the Joint Petition contains information

that Discovery's largest creditor, Nansay Hawaii, Inc., has reached a tentative agreement under which it will dispose of a significant portion of its debt and preferred stock interest in Discovery.

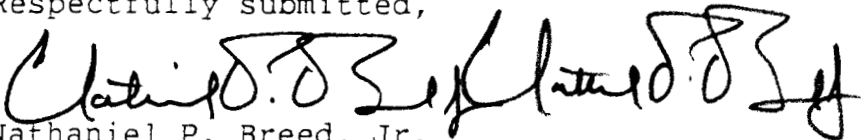
6. In light of the foregoing developments, it has become pointless to investigate potential foreign control over Discovery by Nansay Hawaii through Mr. Ho, since those relationships are in the process of being liquidated. Even if such potential foreign control (which Discovery and Mr. Ho deny) were found to exist, the remedy imposed would be an order requiring divestiture. Such divestiture is already under way.

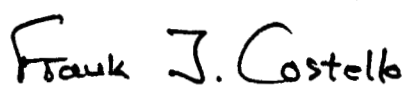
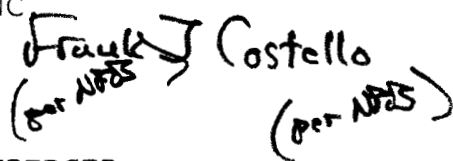
7. Similarly, if the DOT Decisionmaker decides to approve the proposed compromise settlement relating to all compliance disposition issues in this case, the proceeding will be terminated as to those issues, thus obviating the need for hearing procedures and other procedural steps in connection with that phase of the investigation in this proceeding.

8. In view of the extremely brief amount of time available for action on this Motion, Discovery and Mr. Ho request that the time period for submission of answers to this Motion be shortened so as to require that any such answers be filed no later than noon on Thursday, June 21, 1990, and respectfully request that the relief requested in this Motion be acted upon by the close of business on Friday, June 22, 1990.

WHEREFORE, Discovery and Mr. Ho respectfully move the Administrative Law Judge to issue an order referring to the DOT Decisionmaker the question of whether a proposed compromise settlement of the issues in this case should be approved in the public interest, and postponing the hearing and all other procedural steps in this case for an indefinite period, pending further action by the DOT and other developments affecting the matters at issue in this proceeding.

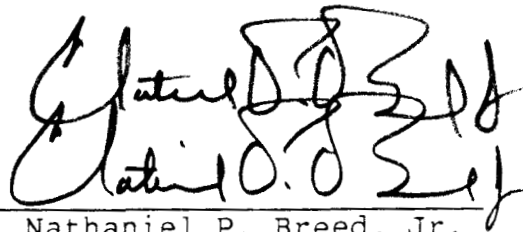
Respectfully submitted,


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PHILIP Y. HO

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Joint Motion by messenger, telecopier transmission, air express service, or by United States mail, properly addressed and with postage prepaid, upon each of the persons listed in Appendix A hereto.


Nathaniel P. Breed, Jr.

Washington, D.C.
June 20, 1990

B/448NPB1039.90

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Discovery Airways, Inc., Nansay Corporation,
Nansay Hawaii, Inc., Philip Ho,
Kenchu Yokeno, Franco Mancassola
Curtis Coward and Lee Hydeman.

Docket 46760

Violations of Sections 401(a) and (b) of the
Federal Aviation Act and 14 CFR 204.5,
300.1 and 300.2

CONSENT ORDER

The Office of Aviation Enforcement and Proceedings has participated as Public Counsel in Docket 46760, In the Matter of Discovery Airways, Inc. and Mr. Philip Ho, an investigation into: (1) whether the Nansay family of companies, including Nansay Corporation and its wholly-owned subsidiary Nansay Hawaii, Inc. (who are not citizens of the United States under the Federal Aviation Act) are in a position to exercise control over Discovery Airways through Philip Ho, a U.S. citizen who is the owner of 75% of Discovery Airways common stock and president of Nansay Hawaii, Inc.; and (2) whether Discovery Airways has the proper compliance disposition to operate as a certificated air carrier under section 401 of the Federal Aviation Act, as amended.¹ Based on its review of the data and information resulting from the investigation, the Office of Aviation Enforcement and Proceedings has determined that Discovery Airways, Inc., Nansay Corporation, Nansay Hawaii, Inc., Philip Ho, Kenchu Yokeno, Franco Mancassola, Curtis Coward and Lee Hydeman have engaged, either jointly or severably as described below, in numerous violations of

¹ Discovery Airways, Inc. filed its initial application for a certificate of public convenience and necessity in Docket 46393, *Application of Discovery Airways, Inc.*. When the Department determined that certain issues pertaining to Discovery Airways' application needed to be resolved in a separate oral evidentiary hearing proceeding, it expanded the scope of the proceeding and instituted *In the Matter of Discovery Airways, Inc. and Mr. Philip Ho* in Docket 46760.

section 401(a) and (b) of the Federal Aviation Act, as amended, and sections 204.5, 300.1 and 300.2 of the Department of Transportation's regulations (14 CFR 204.5, 300.1 and 300.2).

The Office of Aviation Enforcement and Proceedings takes the position that these violations include , but are not limited to:

- a. Failure to inform the Department of Transportation that various documents submitted to the Department were not executed on the dates indicated on the documents.
- b. Failure to use its then legal name (Sun Air) when it filed its initial certificate application with the Department of Transportation on July 14, 1989.
- c. Failure to completely, candidly and accurately describe to the Department of Transportation Franco Mancassola's (an Italian citizen) role in the management, operation and control of Discovery Airways, Inc.
- d. Failure to advise the Department of Transportation promptly that - Franco Mancassola had been elected to the position of Executive Vice President of Discovery Airways, Inc. on May 8, 1990.
- e. Failure to cooperate fully in the development of the evidentiary record in Docket 46760, as required by the Department in Order 90-1-60, issued January 29, 1990, by failing to make Mrs. Tomomi Ho available for deposition in Honolulu, Hawaii, during the period May 14-25, 1990.
- f. Failure to advise the Department of Transportation that Philip Ho obtained all of the money he used to purchase his 75% interest in Discovery Airways Inc. from two foreign sources, including a gift or loan from his wife, who is a Japanese citizen, and a bonus from Nansay Corporation, USA, a Japanese citizen.
- g. Failure to advise the Department of Transportation on numerous occasions that, notwithstanding representations to the contrary, Philip Ho had not as of the dates in question paid \$1,000,000 for his 75% interest in Discovery Airways' common stock.
- h. Failure to submit to the Department of Transportation in a timely fashion all documents relevant to the Commercial Agreement between British Aerospace Corporation and Discovery Airways, Inc. which was executed on July 12, 1989.

Mr. Hydeman takes the position that the sole purpose and effect of his involvement in the pleading process of Docket 46393 was to clear up points in dispute, not to attempt to mislead the Department, and that the deposition testimony supports that

assertion. With respect to the involvement of Curtis M. Coward as regulatory counsel to Discovery Airways, Inc. in Docket 46393, Mr. Coward takes the position that he did not knowingly mislead the Department. Further, Discovery accepts full responsibility for its contribution to the errors of fact and judgment which arose in the submissions on behalf of Discovery and for the information upon which Mr. Coward relied in connection with its pleadings in Docket 46393.

This order is based on the Direct Testimony of Desta B. McDowell, a Transportation Industry Analyst in the Department of Transportation's Office of Aviation Analysis, circulated to the parties and the Administrative Law Judge in the Docket 46760 proceeding on June 7, 1990. With the exception of certain minor points which do not affect the disposition of this order, all of the parties to this order have stipulated that Ms. McDowell's testimony presents a fair, impartial and accurate representation of the facts in this matter. ¹

The Office of Aviation Enforcement and Proceedings and the named parties to this order have reached a settlement in this matter. While neither admitting nor denying the allegations, the named parties consent to the issuance of this order, with its findings and conclusions, and the payment of a compromise civil penalty in the amount of \$50,000. The named parties have also agreed to cease and desist from further violations of sections 401(a) and (b) of the Federal Aviation Act, as amended, and sections 204.5, 300.1 and 300.2 of the Department of Transportation's regulations. The Office of Aviation Enforcement and Proceedings believes that this order satisfactorily addresses all substantive enforcement issues raised in Dockets 46393 and 46760. Finally, the Office of Aviation Enforcement and Proceedings does not object to the temporary exemption granted to Discovery Airways, Inc. by Order 90-3-48 being extended through June 30, 1991, or until ninety (90) days after Mr. Ho has complied with ordering paragraph 10 of this order, whichever occurs first.

¹Discovery Airways, Inc., Philip Ho and the Office of Aviation Enforcement agree that the voting trust agreement entered into between Discovery Airways, Inc., Philip Ho and Senator Hiram Fong is not a long-term solution to the foreign control problems raised in Dockets 46393 and 46760. The parties further stipulate that, although not the subject of this Consent Order, the voting trust agreement is not serving a purpose for which it is intended. Based on deposition testimony the parties agree that no one is fully representing Mr. Ho's 75% voting interest in the airline. In this connection, a majority of the remaining voting stock (14.85% of 25%) is controlled by a foreign citizen, Franco Mancassola. For this reason, Mr. Ho and Discovery Airways, Inc. agree to take the necessary steps to ensure that Mr. Ho's stock interest in Discovery Airways, Inc. is effectively and independently represented by a U.S. citizen until Mr. Ho's majority interest in Discovery Airways, Inc. is remedied in accordance with ordering paragraph 10 of this order.

ACCORDINGLY,

1. Based on the above discussion (including the Direct Testimony of Desta B. McDowell), the settlement between Discovery Airways, Inc., Nansay Corporation, Nansay Hawaii, Inc., Philip Y. Ho, Kenchu Yokeno, Franco Mancassola, Curtis Coward and Lee Hydeman and the Office of Aviation Enforcement and Proceedings is found to be in the public interest and is approved. On the basis of the foregoing settlement, the foreign control investigation with respect to Philip Ho, Nansay Corporation and Nansay Hawaii, Inc. and the compliance disposition investigation involved in Docket 46760 are hereby terminated.
2. The Direct Testimony of Desta B. McDowell, a Transportation Industry Analyst in the Office of Aviation Analysis, prepared in the Docket 46760 proceeding and signed on June 7, 1990, is incorporated by reference as a part of this order, and presents a fair, impartial and accurate representation of the facts involved in this order.
3. Discovery Airways, Inc., Nansay Corporation, Nansay Hawaii, Inc., Philip Ho, Kenchu Yokeno and Franco Mancassola are found to have engaged in air transportation in violation of section 401 (a) of the Federal Aviation Act, as amended, by virtue of the fact that more than 25% of the voting interest in Discovery Airways Inc. common stock was "owned or controlled" by persons who are not "citizens of the United States," as those terms are used in section 101(16) of the Act.
4. Discovery Airways, Inc., Nansay Corporation, Nansay Hawaii, Inc., Philip Ho, Kenchu Yokeno, Franco Mancassola, Curtis Coward and Lee Hydeman are found to have failed to provide complete, candid and accurate information to the Department of Transportation in the course of applying for a certificate of public convenience and necessity in violation of section 401 (b) of the Federal Aviation Act, as amended, and section 204.5 (14 CFR 204.5) of the Department of Transportation's regulations.
5. Lee Hydeman is found to have violated section 300.2 of the Department of Transportation's regulations (14 CFR 300.2) by engaging in prohibited substantive communications with members of the Department of Transportation's staff on December 26, 1989, in connection with related Docket 46393, *Application of Discovery Airways, Inc.*, in connection with the request of Discovery Airways, Inc. to commence precertification advertising subsequent to issuance of Show Cause Order 89-12-60.
6. Discovery Airways, Inc., Nansay Corporation, Nansay Hawaii, Inc., Philip Ho, Kenchu Yokeno and Franco Mancassola are ordered to cease and desist from further violations of section 401(a) of the Federal Aviation Act, as amended.

7. Discovery Airways, Inc., Nansay Corporation, Nansay Hawaii, Inc., Philip Ho, Kenchu Yokeno, Franco Mancassola, Curtis Coward and Lee Hydeman are ordered to cease and desist from further violations of sections 401(b) of the Federal Aviation Act, as amended, and section 204.5 and 300.1 of the Department of Transportation's regulations (14 CFR 204.5, 300.1).

8. Lee Hydeman is ordered to cease and desist from further violations of section 300.2 of the Department of Transportation's regulations (14 CFR 300.2).

9. Discovery Airways, Inc., Nansay Corporation, Nansay Hawaii, Inc., Philip Ho, Kenchu Yokeno, Franco Mancassola, Curtis Coward and Lee Hydeman are jointly and severably assessed \$50,000 as a compromise of civil penalties that might otherwise be assessed for the violations found in ordering paragraphs (3)-(5) of this order. Payment shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed wire," to the account of the U.S. Treasury. The wire transfer shall be executed in accordance with the attached instructions. Failure to pay the penalty as ordered will subject Discovery Airways, Inc., Nansay Corporation, Nansay Hawaii, Inc., Philip Y. Ho, Kenchu Yokeno, Franco Mancassola, Curtis Coward and Lee Hydeman to assessment of interest, penalty and collection charges under the Debt Collection Act, and possible enforcement action for failure to comply with this order.

10. Within six months, U.S. citizens shall own at least 75% of Discovery Airway Inc.'s voting common shares and the corporation shall be controlled in fact by U.S. citizens. For purposes of compliance with this paragraph, Mr. Philip Y. Ho shall not be considered a U.S. citizen. The new owner or owners shall be bona fide investors. The Department may, upon a showing of good faith efforts to achieve this goal, permit an extension of this requirement for up to an additional six months.

11. Discovery Airways, Inc. shall not receive a permanent certificate of public convenience and necessity until such time as Philip Ho disposes of his common stock interest in Discovery Airways, Inc. pursuant to ordering paragraph 10 of this order, and the Department of Transportation has had the opportunity to determine that the air carrier is fit with the new ownership².

12. Until such time as Philip Ho disposes of his common stock interest in Discovery Airways, Inc., as directed in ordering paragraph 10 above, Philip Ho and any other person having any relationship with Nansay Corporation, Nansay

²The Office of Aviation Enforcement and Proceedings has been informed that Nansay Hawaii, Inc. has entered into an agreement to sell some of its debt and preferred stock interest in Discovery Airways, Inc. to another Japanese corporation. Therefore, in addition to reviewing the fitness and citizenship of the person or persons who purchase Mr Ho's common stock interest in Discovery prior to issuing the airline a permanent certificate, the Department may review the details of the new debt and preferred stock arrangement as they may affect the fitness and control of Discovery.

Hawaii, Inc. or any other Nansay Corporation affiliated entity or acting on behalf of Philip Ho, Nansay Corporation, Nansay Hawaii, Inc., or any other Nansay Corporation affiliated entity shall not engage in substantive business communications of any nature with any officer, employee or official of Discovery Airways, Inc., except that Philip Ho and Nansay Hawaii, Inc. may receive financial statements from the airline in the normal course of business, including communications related to the disposition of their interests in the airline; provided that copies of such communications shall be provided to the Fitness Division of the Department's Office of Aviation Analysis within seven days after such communication.

Samuel Podberesky
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Kenchu Yokeno

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SERVICE LIST, Docket 46760

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